United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: December 15, 1997

Case No.: 96 INA 350

In the Matter of:

KARMEL,
Employer,

on behalf of

ARTUR SOURENIAN,
Alien

Appearance: G. H. Manulkin, Esq., Fountain Valley, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ARTUR SOURENIAN (Alien) by KARMEL (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions at that time and place.

STATEMENT OF THE CASE

On August 30, 1994, the Employer, which manufactures fine jewelry, and wholesale mountings on special orders, applied for alien labor certification to enable the Alien to fill the position of a "Chain Maker."[2] The job was classified under the Occupational Code No. 700.381-010 for "Chain Maker." The duties of the Job to be Performed set out in the application were the same as those stated in the DOT occupation code description.[3] While the Employer did not specify educational or training criteria, it did require two years of experience in the Job Offered.[4] The Employer rejected all of the U. S. workers who applied for the position. AF 28.

Notice of Findings. On August 30, 1995, the CO's Notice of Findings (NOF) denied certification, subject to rebuttal because the U. S. workers were rejected on the basis of undisclosed job selection criteria. AF 24. Citing **Microbilt**, 87 INA 635 (Jan. 12, 1988), the Co observed that Employer's offer of employment was the same as the DOT description of the duties of a Chain Maker in Occupational Code 700.381-010. The CO then said that the Employer rejected U. S. worker Mayra Lemus on grounds that she lacked the requisite skills to perform the job:

> She does not have experience or abilities in melting gold to form various shapes of chains. She has no experience assembling heavier types of chains or making wires. She also does not have experience polishing jewelry. Since Ms. Lemus does not [have] experience performing the job duties for this job and is unable to perform the job duties, she is

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[2]The Alien worked as a Chain Maker in Armenia from 1988 to 1992.

[3]**700.381-010 CHAIN MAKER, HAND (jewelry-silver.)** Forms chains of various shapes and designs from gold wire to make jewelry articles according to specifications: Winds wire into coils, using coiling device. Saws coils through one side to form separate links, using handsaw. Assembles links in specified manner to form rope chain or fancy links, using pointed pliers. Solders links to form chain, using gold solder and gas torch. Immerses chain in chemical baths to clean gold. Polishes chain, using jeweler's rouge and felt polishing wheel. GOE: 06.01.04 STRENGTH: L GED: R4 M2 L3 SVP: 6 DLU: 77

[4]This forty hour a week job ran from 9:00 AM to 5:00 PM and the wage was $10 per hour.

rejected for this position.

As such skills were not required in Employer's application, it cannot now cite such requirements to justify an assertion that this or any other U. S. applicant is not qualified, said the CO in concluding that the Employer had failed to establish that its reasons for rejecting the U. S. applicant were either lawful or job-related under 20 CFR §§ 656.21(b)(6) and 656.21(j)(1). The CO added that these findings support the rejection of Employer's application for certification, as it failed to prove good faith recruitment under 20 CFR § 656.21(b)(6), and its rejection of this applicant demonstrated that the position offered is not open to U.S. workers as provided by 20 CFR § 656.20(c)(8). Moreover, added the CO, the experience stated in U. S. applicant's resume indicated that she did meet the new criteria on it had based its rejection was based, and that she was, in fact, qualified for the position under the Employer's altered job requirements.

Rebuttal. The Employer contested the NOF findings by its letter of September 18, 1995. The Employer asserted that during its interview with Ms. Lemus it had learned that her experience was limited to rope chains, that she did not have experience in assembly "heavy weight chains," in making chains from gold wire, or in the use of a jeweler's rouge and felt polishing wheel, all of which it contended were "core job duties." AF 18.

Final Determination. Finding the rebuttal unpersuasive, on October 12, 1995, the CO issued a Final Determination (FD) denying certification. AF 09-13. The CO restated the deficiencies noted in the NOF, which were incorporated by reference into the Final Determination. The CO then said that the Employer's rebuttal asserted previously unstated grounds for rejecting Ms. Lemus in responding to the NOF, which was based on Employer's initial rejection of the U. S. applicant. The rebuttal did not respond to the NOF, said the CO, because it was a belated attempt to change the Employer's initially stated grounds for rejection and ignored the critical finding that Employer had rejected the U. S. worker based on job requirements that it had were not stated in Employer's application for alien labor certification. The CO explained that

> [T]he clear language of form ETA 750 Part A gives the employer the chance to state in detail the minimum education, training, and experience necessary to perform satisfactorily the job duties described. The employer cannot, when faced with a seemingly qualified applicant, devise new requirements to reject that applicant. Such conduct does not result in lawful job related reasons for rejection. But this is what the employer did in this instance. Thus, the employer remains in violation of the regulations.

AF 12-13. The CO concluded that the Employer rejected the U. S. worker based on requirements that were not stated in its offer of employment and that thus had failed to recruit in good faith within the meaning of 20 CFR § 656.21(b)(6) and that the position at issue was not clearly open to a U. S. worker under 20 CFR § 656.20(c)(8) for this reason.

Appeal. Employer appealed the denial on October 24, 1995. AF 02.[5] Employer contended that the criteria it discussed in rebuttal simply illustrated the job elements "by explaining each procedure listed" in order "to distinguish the duties to be performed from the very entry level qualifications of Ms. Lemus in Chain Making and to demonstrate her lack of qualifying experience." AF 03. Employer then cited panel decisions in support of its contentions.

DISCUSSION

It is fundamental that an Employer is required to show that its reasons for the rejecting each U. S. job applicant were lawful and job related. 20 CFR § 656.21(b)(7); and see **Richco Management**, 88 INA 509 (Nov. 21, 1989). In this regard the Board has commented that

> Both of [that] Employer's arguments misconstrue the purposes of Items 14 and 15 on the ETA 750A Form, one of which is to notify the CO of Employer's minimum requirements so that the CO may, if necessary, challenge the stated requirements as unduly restrictive or as not the actual minimum. See 20 CFR §§ 656.21(b)(2) and 656.21(b)(6). In this way the CO may protect potential U. S. applicants who may be discouraged from applying for the job by advertised requirements which are unduly restrictive or not the actual minimum.

Bell Communications Research, Inc., 88 INA 026 (Dec. 22, 1988) (en banc).

The Employer's appeal is addressed to the meaning of its rebuttal, essentially attempting to explain that it did not intend to add to the reasons it initially had given for its rejection of Ms. Lemus, the U. S. worker who applied for the position at issue. The CO's analysis in the Final Determination was based on the detailed analysis of the application in the context of the NOF and the reasons supporting Employer's Rebuttal position. The Employer's appeal apparently concedes that its stated reasons for rejecting this candidate require explanation and interpreta-

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[5]Although the Employer mistakenly requested that BALCA reconsider the denial of certification, the CO denied the motion in referring the Employer's appeal on February 22, 1996, and the Employer's error is not material as a consequence. See AF 01.

tion in order to avoid the inference drawn by the CO in the Final Determination. As the Employer failed to explain its failure to state its Rebuttal in such terms, its argument on appeal submitting this version of its reasons for rejection for the first time after the Final Determination cannot be considered now. **Sharp Screen Supply, Inc.**, 94 INA 214 (May 25, 1995).

After reading the CO's discussions in the NOF an the Final Determination together with the Employer's Rebuttal and Appeal it now appears that the evidence of record supports CO's inference that the reasons for rejection of Ms. Lemus cited in the Rebuttal were not stated in the offer of employment stated in the application for certification. As Employer's later reasons for rejecting this candidate were inconsistent with the job requirements originally stated in its application, it must be concluded that the CO had sufficient evidence of record to support the finding that the Employer failed to recruit in good faith under 20 CFR § 656.21(b)(6) and that the job was not clearly open to a U. S. worker under 20 CFR § 656.20(c)(8).

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.